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No. 213

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
J. F. BISHOP,
Attorney,
Department of Justice,
Washington 25, D. C.

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to the request of the Court during the oral argument of this case, we furnish the following information:

1. Circular No. 3663 of the Department of Justice, Supp. No. 9, dated April 6, 1943, provides in full text as follows:

TO ALL UNITED STATES ATTORNEYS

Re: Denaturalization

There has been prepared and the mimeographing just completed of a compendium of legal theories and precedent, problems of

pleading and practice, and matters of policy and procedure pertinent to cases within the denaturalization program. A copy is enclosed for the assistance of your office. This compilation represents extensive research and has been prepared with the realization that denaturalization cases based on mental reservation present problems which may be new to some of the United States Attorneys inasmuch as there have been few cases of this type tried in most districts. It is intended that this compilation be available for reference, and at the same time it is believed highly important that the attorneys handling denaturalization cases be thoroughly familiar with the theories, precedent and problems contained in this compilation in order to prepare and present the cases with the greatest effectiveness.

FRANCIS BIDDLE,
Attorney General.

The memorandum referred to is a document of 158 pages. The pertinent portions relating to the affidavit are as follows:

* * * * *

C. Affidavit:

8 U.S.C. § 738 provides for an affidavit in the institution of proceedings to cancel citizenship. It has been held, however, that the affidavit is not jurisdictional and that the United States Attorneys may institute proceedings

upon their own initiative. *Schwinn* v. *United States*, 112 F. (2) 74 (C.A.A. 9th, 1940), affirmed 311 U.S. 616; *United States* v. *Leles*, 227 Fed. 189 (N.D. Calif., 1915); *United States* v. *Knight*, 291 Fed. 129 (D.C. Mont., 1923), affirmed 299 Fed. 571 (C.C.A. 9th, 1924).

In the *Leles* case, the court said that the purpose of the affidavit was to put "the wheels of justice in motion." That court also said that it was not intended to be a pleading and therefore need only set forth "the substantive matter required * * * however informally or inartificially stated." The court also said that the facts might be stated upon information and belief in an affidavit of this character.

But where an affidavit is submitted, it must set forth facts showing good cause for cancellation of citizenship. Two Circuit Courts of Appeals have affirmed decrees for the defendants in suit where the affidavits were deemed insufficient. *United States* v. *Richmond*, 17 F. (2) 28 (C.C.A. 3d, 1927); *United States* v. *Salomon*, 231 Fed. 928 (C.C.A. 5th, 1916).

In *United States* v. *Ali*, 7 F. (2d) 728 (E.D. Mich., 1925), the petition recited that it was based on the affidavit of a United States examiner, which was signed and sworn to before the filing of said petition, and was filed after the filing of the petition. The court said in that case that it would have been better practice to file the affidavit or a copy thereof, on which the petition was based, as a part of the petition.

As indicated below in "IV. Pre-Trial Procedure", the defendant can probably obtain most of the government's evidence by a proper utilization of the methods of discovery provided in Rules 16, 33, and 34. It, therefore, may be advisable at the outset to furnish him with a reasonable amount of the government's evidence in order to reduce the chance of these discovery rules being employed, and thus avoid the ensuing delay. If this is done, it would seem that the affidavit rather than the complaint is the proper place in which to recite evidence.

In the event it is decided in a given case to furnish the defendant with some of the government's evidence, it is recommended that an affidavit be prepared and served with the complaint and that in the affidavit there be recited briefly the nature of the evidence to be relied upon. This recitation of evidence should be of a general nature but sufficient to reduce the ordinary chance of the discovery rules being employed and at the same time to reduce the likelihood of the government having to oppose a motion for a bill of particulars. On the other hand, it should not be so complete as to provide the defendant with the names of witnesses and possibly can be so phrased as not to disclose their identity. Similarly, it may be disadvantageous to make it so complete as to identify specific instruments or writings, for this may increase the likelihood of a demand

for their production under Rule 34. It would seem sufficient to set out the general substance or type or statements or writings known to have been made without quoting them. It would also seem proper to aver generally membership and leadership in the German-American Bund or other un-American organizations, refusal of military service, general propaganda activities, etc.

If it is believed undesirable to attach an affidavit to the complaint and to serve it upon the defendant, as discussed above, in that instance no reference should be made in the complaint to an affidivit having been prepared and as constituting the basis of the action.

A prior Circular No. 3663 of the Department of Justice, Supp. No. 1, dated May 29, 1942, provides in pertinent text as follows:

To All United States Attorneys:

The following information and suggestions are furnished for any assistance they may be to you with respect to cases in your district to cancel naturalization certificates upon the grounds of mental reservation and lack of attachment to the United States Constitution demonstrated by disloyal and un-American statements, writings and conduct.

* * * * *

We have not prepared a form of the affidavit mentioned in Section 738, Title 8, United States Code, and have not included in the complaint an allegation with respect thereto for the reason that it appears the affidavit is not a jurisdictional matter and its form and inclusiveness may vary widely. It should be noted in cases of the type mentioned herein that the Immigration and Naturalization Service is not preparing the affidavits, it being expected that such affidavits, as well as the complaints, will be prepared in your office.

Inasmuch as the Federal Bureau of Investigation is conducting the active investigation in these cases and accordingly will be developing the major portion of the evidence on which the proceedings are based, a Special Agent of the Federal Bureau of Investigation acquainted with the facts will be in a position to sign the affidavit mentioned in Title 8, United States Code, Section 738.

* * * * *

During recent years, on various occasions, in individual correspondence, the Department has instructed United States attorneys that the affidavit of probable cause supplied by the Immigration and Naturalization Service is not a jurisdictional re-

quirement and in the specific case should not be filed in the proceedings.

2. The Immigration and Naturalization Service of the Department was transferred to the Department of Justice by Reorganization Plan No. V, effective June 14, 1940 (54 Stat. 230, 1238).

3. With respect to the number of denaturalization proceedings instituted, the following table is based upon the tabulations in the Annual Reports of the Administrative Office of the United States Courts, Table C-2, "Civil Cases Commenced in the United States District Courts; United States cases, United States plaintiff; Enforcement of Federal Statutes, Denaturalization." We are informed by Mr. Thiel of the Administrative Office that the classification "Denaturalization" includes all denaturalization proceedings brought by the United States under Section 340 of the Immigration and Nationality Act of 1952, and predecessor provisions, and may also include the few other cases involving loss of nationality (*e.g.*, expatriation) which are brought by the United States as plaintiff. We are indebted to Mr. Thiel for the figure for the fiscal year 1955 from the preliminary draft of the Annual Report, September, 1955.

Fiscal Year	Total	Districts	District of Columbia	Alaska, Canal Zone, Guam and Virgin Islands
1955	557	555	1	1
1954	333	331	1	1
1953	317	316	1	—
1952	272	268	4	—
1951	611	611	—	—
1950	605	605	—	—
1949	253	250	3	—
1948	350	348	—	2
1947	132	130	1	1
1946	215	215	—	—
1945	200	200	—	—
1944	226	221	2	3
1943 [1]	710	706	2	2
1942 [1]	360	354	2	4
1941 [2]	949	942	3	4

[1] Table 6 instead of Table C–2.
[2] Table 7 instead of Table C–2.

Respectfully submitted,

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Solicitor General.
J. F. BISHOP,
Attorney.

JANUARY, 1956.

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The requirement of an affidavit of good cause was again recognized in *United States* v. *Salomon,* 231 Fed. 928 (5th Cir. 1916), where the Court said:

> "The district attorneys are authorized to institute the proceedings only 'upon affidavit showing good cause therefor.'" (p. 929)

This language was quoted with approval in *United States* v. *Richmond,* 17 F. 2d 28, 33 (3d Cir. 1927). See also Van Dyne, *A Treatise on the Law of Naturalization of the United States* (1907), page 138.

These decisions were in accord with the legislative history of the statute, which is set forth in the District Court's opinion (A. 18-20, 24-25).

Moreover, the requirement of an affidavit of good cause is consistent with the usual requirement of a preliminary showing of merit to reopen a judicial decree, particularly in a matter of such great importance as United States citizenship. Cf. *Schneiderman* v. *United States,* 320 U. S. 118, 122 (1943).

II

The cases cited by the Government as conflicting with the decision below do not justify a grant of certiorari.

The cases which have held, contrary to the decisions cited in Point I, that an affidavit of good cause is not necessary, represent a recent aberration, which will probably not continue, now that the Court below has made clear the history and purpose of the statute and its interpretation.

We may lay to one side the district court cases cited by the Government (Petition, p. 5), since conflict with district court cases is not an express consideration governing review on certiorari (Supreme Court Rule 19, subd.

1(b)). Many are in the Southern District of New York and would no longer be followed in view of the holding in the Court below. We simply note that there are other district court decisions recognizing the necessity of an affidavit of good cause. *United States* v. *Candela*, 131 F. Supp. 249 (S. D. N. Y. 1954); *United States* v. *Hartmann*, 2 F. R. D. 477 (E. D. Pa. 1942).

Of the two court of appeals cases cited by the Government (Petition, p. 4), the earlier one would probably not be followed today in the Court which decided it, and the later one simply cited that decision as authority.

Schwinn v. *United States*, 112 F. 2d 74 (9th Cir. 1940), affirmed on other grounds in 311 U. S. 616, is the earlier of the two cases. It did not involve the necessity for an affidavit of good cause, since such an affidavit was filed with the complaint (Petition, p. 4, n. 1); the argument went only to the necessity of the District Attorney presenting the affidavit in evidence at the trial (112 F. 2d at 75). In holding that the affidavit was not jurisdictional, the Court reasoned that the district attorney could institute denaturalization proceedings *sua sponte*, and that "The statute is inclusive, not exclusive, and * * * does not preclude public prosecutors from proceeding of their own motion to enforce the laws" (112 F. 2d at 76), citing *United States* v. *Knight*, 294 Fed. 129, 130 (D. Mont. 1923). Subsequently, this Court removed the express ground of the *Schwinn* opinion by holding that the denaturalization statute is the *exclusive* procedure for revoking a naturalization certificate. In *Bindczyck* v. *Finucane*, 342 U. S. 76, 83 (1951), this Court stated

> "* * * we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, *Congress formulated a self-contained, exclusive procedure.* With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a